No. 18-96

IN THE

Supreme Court of the United States

TENNESSEE WINE AND SPIRITS RETAILERS ASSOCIATION,
Petitioner,

v.

ZACKARY W. BLAIR, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF NATIONAL ALCOHOL BEVERAGE CONTROL ASSOCIATION AND NATIONAL LIQUOR LAW ENFORCEMENT ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

J. NEAL INSLEY
LARRY BUCKNER
NATIONAL ALCOHOL BEVERAGE CONTROL ASSOCIATION
4401 Ford Avenue
Suite 700
Alexandria, VA 22302-1473
(703) 578-4200
neal.insley@nabca.org

RACHEL BLOOMEKATZ
Counsel of Record
ALEXANDRIA TWINEM
GUPTA WESSLER PLLC
1900 L Street, NW
Suite 312
Washington, DC 20036
(202) 888-1741
rachel@guptawessler.com

Counsel for Amici Curiae

November 20, 2018

TABLE OF CONTENTS

Table of authorities iii
Introduction and interest of *amici curiae* 1
Background 3
I. Regulatory Structure 3
II. Alcohol Enforcement Agents 7
Summary of argument 11
Argument 13
I. In-state residency requirements are critical to states' efforts to enforce alcohol regulations for the health and safety of their citizenry. 13
A. Residency requirements ensure that agents can physically inspect licensees' premises and products. 14
B. In-state residency requirements facilitate enforcement actions for violations of state alcohol laws. 17
C. Residency requirements foster self-regulation through ties to the community and local pressure. 19
II. Eliminating in-state presence requirements would undermine the efficacy of the entire three-tier system of alcohol control. 21
A. The three-tier system provides an effective method for states to regulate alcohol within their borders. 22

B. Eliminating states' physical presence requirements would undermine the effectiveness of the three-tier system. 25

III. Durational residency requirements are even more potent in effectuating the goals of the three-tier system. 27

Conclusion 28

TABLE OF AUTHORITIES

Cases

Bacchus Imports, Ltd. v. Dias,
468 U.S. 263 (1984) 2, 11, 13

Burnham v. Superior Court of California,
495 U.S. 604 (1990) 19

Duckworth v. Arkansas,
314 U.S. 390 (1941) 1

Family Winemakers of California v. Jenkins,
592 F.3d 1 (1st Cir. 2010) 24

Granholm v. Heald,
544 U.S. 460 (2005) ..... *passim*

North Dakota v. United States,
495 U.S. 423 (1990) 4, 5

Southern Wine & Spirits of America v. Division of Alcohol & Tobacco Control,
731 F.3d 799 (8th Cir. 2013) 19

Shaffer v. Heitner,
433 U.S. 186 (1977) 18

Statutes and regulations

Ala. Code § 28-5-10 14

Ala. Code § 28-7A-6 14

Alaska Stat. § 04.11.430 5

Ariz. Admin. Code R19-1-201 5

Ark. Code Ann. § 3-2-205 14

Ga. Code Ann. § 3-2-32 14

Ind. Code § 7.1-2-3-12 14

La. Stat. Ann. § 26:375 14

Mass. Gen. Laws Ann. Ch. 138, § 15 5

Md. Code Ann., Alco. Bev. § 6-202 14

Mo. Rev. Stat. §§ 311.490–311.540 14

N.C. Gen. Stat. Ann. § 18B-502 14

N.C. Gen. Stat. Ann. § 18B-900 5

N.D. Cent. Code § 5-03-01 5

N.H. Rev. Stat. Ann. § 177:16 5

Neb. Rev. Stat. Ann. § 53-125 5

R.I. Gen. Laws Ann. § 3-5-10 5

Tenn. Code Ann. § 57-3-203 6

Tenn. Code Ann. § 57-3-204 ..... 6, 14

Tenn. Code Ann. § 57-3-409 14

Texas Alco. Bev. Code Ann. § 101.04 14

Va. Code Ann. § 4.1-204 15

Legislative materials

Legal Issues Concerning State Alcohol Regulation: Hearing Before the Subcomm. on Courts & Competition Policy of the H. Comm. on the Judiciary, 111th Cong. 43 (2010) 16

Sober Truth on Preventing Underage Drinking Act, Pub. L. No. 109-422, 120 Stat. 2890 (2006) 19

Other authorities

American Association of Wine Economists, Working Paper No. 61, *Direct Ship Blowout: How the Supreme Court's Granholm Decision Has Led to a Flood of Non-Taxed Wine Shipments* (June 2010) 26

The Beverage Information Group Handbook Advance (2011) 6

The Beverage Information Group Handbook Advance (2018) 6

Jack Broom, *NW Grocery Chain Pulls Four Loko Drinks off Shelves*, Seattle Times (Oct. 26, 2010) 21

Centers for Disease Control & Prevention, *Impaired Driving: Get the Facts* (2017) 8

Centers For Disease Control & Prevention, *Fact Sheets—Alcohol Use and Your Health* (Jan. 3, 2018) 1

Cowen, *Nielsen Spirits Update*, (Nov. 13, 2018) 6

Death Toll from Indonesia Tainted Liquor Rises to 82, Reuters (Apr. 11, 2018) 9

Jessica De Nova, *Business Owners Around Cancun Admit Tainted Alcohol Is an Ongoing Problem*, WFAA (ABC Dallas) (Dec. 7, 2017) 9

Roni Elias,
Three Cheers for Three Tiers: Why the Three-Tier System Maintains Its Legal Validity and Social Benefits After Granholm,
14 DePaul Bus. & Com. L.J. 209 (2016) 23

Pamela Erickson,
Safe and Sound: How the Three-Tier Alcohol Regulatory System Promotes Safe Products and High Revenue Collections (Apr. 2015) 23, 24

Benjamin Fearnow,
Blackouts, Deaths at Mexican Resorts Prompt US State Department Investigation,
International Business Times (Dec. 13, 2017) 25

Raymond B. Fosdick & Albert L. Scott,
Toward Liquor Control (1933) 20

Pat Gagliardi,
The Need for State Alcohol Regulatory Funding: Fighting Deregulation by Defunding (2013) ..... *passim*

Sarah Kaplan,
Nearly 100 Die from Drinking Tainted Alcohol in Mumbai 'Hooch Tragedy', Washington Post (June 22, 2015) 25

Neil MacFarquhar,
Where the Booze Can Kill, and Putin Is Deemed a 'Good Czar', N.Y. Times (Feb. 18, 2017) 25

Benjamin Mueller,
Tainted Bootleg Alcohol Kills Dozens and Poisons Hundreds in Iran, New York Times (Oct. 2, 2018) 9

Matthew Reid,
Medford Liquor Stores Pull Four Loko from Shelves before Ban, Wicked Local (Nov. 24, 2010) 21

Moonshine Bust: Police Seize 67 Gallons from Alleged Bootlegger's Home, NBC Washington (Oct. 19, 2017) 9

More than 80 gallons of moonshine seized in Hancock County, Miss.: report, WGNO (ABC New Orleans) (June 28, 2018) 9

National Highway Traffic Safety Administration, Pub. No. 812 450, *Alcohol-Impaired Driving* (Oct. 2017) 8

National Highway Traffic Safety Administration, *The Role of Alcohol Beverage Control Agencies in the Enforcement and Adjudication of Alcohol Laws* (2005) 8, 15, 17

National Institute on Alcohol Abuse & Alcoholism, *Alcohol Facts and Statistics* (Aug. 2018) 1

César Rodriguez,
45 gallons of pulque seized in Laredo amid warning of tainted alcohol in Mexico, Laredo Morning Times (Aug. 8, 2017) 9

Bibeka Shrestha,
Boston Beer Gets $20.5M to Settle Recall Claims, Law 360 (May 10, 2011) 24

Jessica C. Starns,
The Dangers of Common Ownership in an Uncommon Industry: Alcohol Policy in America and the Timeless Relevance of Tied-House Restrictions (2017) 4

Scores of TGI Fridays Among New Jersey Bars Accused of Substituting Cheap Alcohol for Premium Brands in Statewide Crackdown,
Daily Mail (May 24, 2013) 15

Substance Abuse & Mental Health Services,
U.S. Department of Health & Human Services,
National Survey on Drug Use and Health: Comparison of 2008–2009 and 2015–2016 Population Percentages (2016) 8

Robert M. Tobiassen,
The "Fake Alcohol" Situation in the United States: The Impact of Culture, Market Economics, and the Current Regulatory System (2014) ..... *passim*

Virginia Department of Alcoholic Beverage Control, *Annual Report* (2017) 14

Wegmans Pulls Four Loko off Store Shelves,
Rochester First (Nov. 10, 2010) 21

INTRODUCTION AND INTEREST OF *AMICI CURIAE*[1]

Alcohol is no ordinary product. It has an inherent dichotomy in its use. Consumed responsibly and properly regulated it can be safely enjoyed by adult consumers. However, it can also be "a lawlessness unto itself." *Duckworth v. Arkansas*, 314 U.S. 390, 398 (1941) (Jackson, J., concurring). Drinking causes more than 80,000 deaths each year, including the deaths of over 1,800 young people between the ages of 18 and 24. Alcohol consumption results in higher rates of accidental injury (and death); sexually transmitted disease; and interpersonal violence, including homicide, suicide, sexual assault, and domestic violence. Regular alcohol consumption can have long-term health consequences, such as high blood pressure, stroke, liver disease, cancer, cardiovascular disorders, and dementia. Altogether, the harmful effects of alcohol consumption cost the U.S. economy almost $250 billion annually. *See* Ctrs. For Disease Control & Prevention, *Fact Sheets—Alcohol Use and Your Health* (Jan. 3, 2018), https://perma.cc/N446-CASB; Nat'l Institute on Alcohol Abuse & Alcoholism, *Alcohol Facts and Statistics* (Aug. 2018), https://perma.cc/NH7F-SX48.

States are charged with the great responsibility, and daunting task, of regulating alcohol within their borders to protect the health and safety of their citizens from these very real threats that alcohol poses. Yet states must do so under profound constraints: The number of agents they can employ is dwarfed by the number of

---

[1] No counsel for a party authored this brief in whole or in part and no person other than amici and their counsel made a monetary contribution to its preparation or submission. The parties' letters consenting to the filing of amicus briefs are on file with the Clerk.

companies involved in the alcohol trade. And alcohol oversight agencies have limited budgets to fund investigations into potential wrongdoing and enforcement actions to hold wrongdoers accountable. In light of this reality, states must pursue the most efficient method of overseeing the alcohol industry.

That is where residency requirements—and durational residency requirements—come in. Far from the type of protectionist policy the Dormant Commerce Clause targets, residency requirements are a critical tool of state regulation to "combat the perceived evils of an unrestricted traffic in liquor." *Bacchus Imps., Ltd. v. Dias*, 468 U.S. 263, 276 (1984). Striking down such requirements would jeopardize the entire system of state regulation and oversight of the alcohol industry.

Amici here have a unique understanding of alcohol regulatory enforcement schemes and the critical role that residency and durational requirements play in furthering health and safety. The National Alcohol Beverage Control Association (NABCA) is an organization composed of government agents responsible for controlling and regulating the distribution and sale of alcoholic beverages in eighteen states throughout the country. As such, it is intimately acquainted with the realities of enforcing alcohol regulation within the United States and how best to effectuate the goals of maintaining an orderly alcohol market, ensuring product integrity, and promoting the states' interests in the health and safety of their citizens.

The National Liquor Law Enforcement Association (NLLEA) is a non-profit association comprised of approximately 1,100 law enforcement personnel dedicated to the enforcement of liquor laws and regulations. The NLLEA is committed to improving the standards and

practices of liquor law enforcement, the professional development of its members, and public recognition of the role and achievements of liquor law enforcement in protecting and promoting public safety. The NLLEA also collaborates with other state and national law enforcement organizations to enhance understanding of the overall importance liquor law enforcement plays in preventing crime and community problems.

Both the NABCA and NLLEA have a significant interest in this case because, as explained below, the elimination of residency requirements would prove catastrophic to the enforcement of state liquor regulations.

BACKGROUND

Tennessee did not enact the challenged licensing requirements in a vacuum. For nearly a century since Prohibition—and since the Twenty-first Amendment enshrined states' rights to regulate alcohol—states have had experience on the front lines of alcohol regulation. Tennessee, like many other states, adopted a durational residency requirement for alcohol licensees based on this experience regulating the flow of alcohol within its borders and in light of the very real financial and other practical constraints it faces in regulating this sui generis product.

I. Regulatory Structure

The Twenty-first Amendment grants to the states "virtually complete control" to regulate or prohibit the transportation and importation of alcohol within their borders in whatever manner they see fit. *Granholm v. Heald*, 544 U.S. 460, 488 (2005). Under the wide latitude granted by the Constitution, each state has developed its own regulatory system. While many features of these

systems vary by state, as a general matter, every state employs some version of what is known as the "three-tier system." *See* Jessica C. Starns, *The Dangers of Common Ownership in an Uncommon Industry: Alcohol Policy in America and the Timeless Relevance of Tied-House Restrictions* 8 (2017), https://perma.cc/A8TJ-CH68. The three-tier system is not a historical accident or a protectionist scheme; it is a deliberate design integral to a state's ability to effectively enforce its duly enacted alcohol laws.

Specifically, the three-tier system was developed in response to the dangers of the "tied-house" model that dominated the alcohol market prior to Prohibition. Under that model, the manufacturers of alcohol products could directly sell to consumers. That vertical integration of alcohol production and sale led to rampant oversupply of alcohol and disregard for alcohol regulations. *See id.* at 4–5, 8–9. With a direct line between the numerous suppliers and countless customers, there was little space for state regulators to intervene and enforce health and safety laws regulating alcohol.

Under the three-tier system, by contrast, alcohol travels through at least three independent levels of distribution before it is enjoyed by the ultimate customer. *See North Dakota v. United States*, 495 U.S. 423, 428 (1990) (describing North Dakota's three-tier system). The alcohol is produced by a manufacturer, such as a distiller, brewery, or winery. The manufacturer may only sell its alcohol to a state-licensed (or state-owned) wholesaler, also known as a distributor. The distributor may sell this alcohol to another licensed wholesaler, or it may sell it to a state-licensed (or state-owned) retailer. The retailer, in turn, is the only type of entity that may sell alcohol directly to the consumer. This Court has

recognized the three-tier system as "unquestionably legitimate." *Granholm*, 544 U.S. at 489 (quoting *North Dakota*, 495 U.S. at 432). Not only is it legal; it also provides myriad avenues for state regulators to ensure that the entire chain of alcohol production and distribution follows the state's health and safety regulations.

Within the three-tier system, states impose numerous restrictions on people and corporations who seek to enter the alcohol industry within their borders. For example, most states require background checks to determine whether the applicants can be trusted to exercise appropriate judgment as an alcohol distributor or purveyor. As part of this three-tier system, too, many states have instituted durational residency requirements on alcohol wholesalers and retailers. *See* Petition at 24 n.3 (listing at least 21 states with durational residency requirements). Other states have instituted in-state presence requirements without mandating a particular duration of in-state residency. *See, e.g.*, Alaska Stat. § 04.11.430; Ariz. Admin. Code R19-1-201; Mass. Gen. Laws Ann. Ch. 138, § 15; Neb. Rev. Stat. Ann. § 53-125; N.H. Rev. Stat. Ann. § 177:16; N.C. Gen. Stat. Ann. § 18B-900; N.D. Cent. Code § 5-03-01; R.I. Gen. Laws Ann. § 3-5-10. Under in-state presence requirements, any alcohol distributor or retailer applying to do business in a state must demonstrate that the person seeking the license (or, if a corporation, its owner or manager) is currently a resident of the state. *See, e.g.*, N.D. Cent. Code § 5-03-01; *see also North Dakota*, 495 U.S. at 447 (Scalia, J., concurring) ("The Twenty-first Amendment . . . empowers North Dakota to require that all liquor sold for use in the State be purchased from a licensed in-state wholesaler."). That is, producers of alcohol throughout the country—vineyards, distilleries, breweries, and the like—can only sell their products in a

given state by contracting with a licensed wholesaler that resides in the state. In turn, that wholesaler can only sell to retailers that reside in the state.

The durational residency requirements, like the one Tennessee instituted, just extend the in-state residency requirement by mandating that distributors and retailers applying to do business in a state demonstrate that the person seeking a license (or the corporation's managers or owners) has resided in the state for a certain period of time. *See, e.g.*, Tenn. Code Ann. §§ 57-3-203(b), -204(b)(2) (requiring two years of residency for both retail and wholesale licenses); *see also* Petition at 24 n.3 (collecting durational residency statutes).

Under the three-tier system of regulation, the alcohol industry has thrived across the fifty states. *See* Cowen, *Nielsen Spirits Update* (Nov. 13, 2018) (highlighting continued growth in spirits market). Over the past decade, gross sales of alcohol products have increased by almost 27%—from approximately $177 billion in 2006 to nearly $224 billion in 2016. *See The Beverage Information Group Handbook Advance* 39 (2018); *The Beverage Information Group Handbook Advance* 143 (2011). By preventing producers from owning retailers or striking anticompetitive deals for retailers to favor their products over their competitors, state alcohol markets remain competitive and offer a wide variety of products at a "wide range of prices from low priced economy to high priced super-premium." Robert M. Tobiassen, *The "Fake Alcohol" Situation in the United States: The Impact of Culture, Market Economics, and the Current Regulatory System* 32, 53–55 (2014), https://perma.cc/W7LE-UUJD.

II. Alcohol Enforcement Agents

While the three-tier system provides structural safeguards against unregulated and oversaturated alcohol markets, much of the day-to-day responsibility for protecting the health and safety of the public from alcohol consumption rests upon the state agencies—and individual agents—that must enforce the laws. In nearly all of the fifty states, alcohol control agents are tasked with ensuring that alcohol markets are orderly and that the state's alcohol laws are enforced to protect the health and safety of its citizens. Though responsibilities differ between jurisdictions, as a general matter, agents are responsible for enforcing the state's laws through inspections, investigations, and, if necessary, fining violators and seizing unsafe or illegal products. At the retail level, for example, agents inspect licensed premises and investigate allegations that these businesses are accepting fraudulent identification, serving intoxicated customers, or providing alcohol to underage patrons. Pat Gagliardi, *The Need for State Alcohol Regulatory Funding: Fighting Deregulation by Defunding* (2013), https://perma.cc/LEE7-VXA5.

Agents also enforce financial regulations on alcohol entities. They collect excise taxes, most often as alcohol passes through an in-state wholesaler. They also investigate hidden ownership cases. These may concern an alcohol producer that has secretly purchased, or made an exclusive deal with, an alcohol retailer, thereby reenacting the destructive "tied-house" model that states have regulated against since the end of Prohibition. Hidden ownership cases may also concern the use of alcohol industry members as fronts to launder money for criminal or terrorist organizations. *Id.*; Nat'l Highway Traffic Safety Admin., *The Role of Alcohol Beverage*

Control Agencies in the Enforcement and Adjudication of Alcohol Laws 4 (2005), https://perma.cc/489K-KLJK.

Agents are further tasked with issues not related to licensed alcohol establishments, which may include investigating unlicensed or "underground" alcohol purveyors, the production and sale of counterfeit alcohol or moonshine, and the manufacture and distribution of fraudulent identification cards. *Id.* at 4. In recent years, alcohol control agents in many states have also been tasked with enforcement related to other vice laws, such as underage tobacco sales, illegal gambling, prostitution, and illicit drugs. *Id.*; Gagliardi, *The Need for State Alcohol Regulatory Funding*.

As *amici* have witnessed first-hand, these state agents have helped achieve significant success in protecting the health and safety of Americans. Over the last decade, the national number of fatalities resulting from drunk driving has decreased nearly twenty percent. Nat'l Highway Traffic Safety Admin., Pub. No. 812 450, *Alcohol-Impaired Driving* 2 fig.1 (Oct. 2017), https://perma.cc/RJU6-Q4R9. Similarly, the CDC's data for 2014—the most recent available—shows that alcohol-impaired driving episodes are at an all-time low. Ctrs. for Disease Control & Prevention, *Impaired Driving: Get the Facts* (2017), https://perma.cc/X6GS-UFVF. The rate of underage drinking has also markedly decreased in the last ten years. Substance Abuse & Mental Health Servs., U.S. Dep't of Health & Human Servs., *National Survey on Drug Use and Health: Comparison of 2008–2009 and 2015–2016 Population Percentages* tbl.6 (2016), https://perma.cc/XRC5-358T.

And alcohol agents each year seize thousands of containers of homemade, counterfeit, tainted, or other potentially dangerous alcohol before it can be purchased

or ingested. *See, e.g.*, *More than 80 gallons of moonshine seized in Hancock County, Miss.: report*, WGNO (ABC New Orleans) (June 28, 2018), https://perma.cc/9SDR-QQGF; *Moonshine Bust: Police Seize 67 Gallons from Alleged Bootlegger's Home*, NBC Wash. (Oct. 19, 2017), https://perma.cc/48LG-DVDV; César Rodriguez, *45 gallons of pulque seized in Laredo amid warning of tainted alcohol in Mexico*, Laredo Morning Times (Aug. 8, 2017), https://perma.cc/6X89-RC33. Indeed, the United States is considered a global leader in preventing counterfeit alcohol from entering the stream of commerce. Tobiassen, *"Fake Alcohol" Situation*, at 7–8, 11–15, 32–50. Though Americans may take the safety and purity of their alcohol for granted, death and injuries related to tainted and counterfeit alcohol consumption are still a common occurrence in other countries around the world. *See, e.g.*, Benjamin Mueller, *Tainted Bootleg Alcohol Kills Dozens and Poisons Hundreds in Iran*, N.Y. Times (Oct. 2, 2018), https://nyti.ms/2PDa7xA; *Death Toll from Indonesia Tainted Liquor Rises to 82*, Reuters (Apr. 11, 2018), https://reut.rs/2KeVFFW; Jessica De Nova, *Business Owners Around Cancun Admit Tainted Alcohol Is an Ongoing Problem*, WFAA (ABC Dallas) (Dec. 7, 2017), https://perma.cc/TDZ7-X9PF.

The continued success of state alcohol control efforts, however, is far from certain. The capacity of state alcohol enforcement agencies is increasingly strained by expanding responsibilities that are not matched by increased funding or personnel. Between 2003 and 2013, the United States experienced an "enormous increase in the sale and consumption of alcohol." Gagliardi, *The Need for State Alcohol Regulatory Funding*. Yet thirty-two states reduced or kept constant the number of enforcement agents despite this explosion in work. *Id.*

During this same period, nearly half of all states also reduced their budget allocations for alcohol control, requiring each agent to do more with fewer resources. *Id.*

The result: alcohol enforcement agents are already unable to provide the type of oversight necessary to meet the expanding market. While in 2003 there was, on average, one agent for every 228 licensed premises, in 2013 the ratio grew to one agent to every 280. *Id.* Since 2013, that ratio has only gotten worse. The reduction in workforce not only means that each agent has less time to inspect, investigate, and provide oversight to licensed (and unlicensed) facilities, it also means that each alcohol agent must cover a greater geographic area. Each agent in Minnesota, for example, is now tasked with inspecting and investigating alcohol establishments covering an average territory of 28,000 miles. *Id.* Agents in eleven other states are also obligated to travel a thousand or more miles on average to review the licensees under their purview.[2] With diminishing numbers and proximity, agents no longer pose the deterrence they once did.

Furthermore, enforcement agents face new challenges arising from technology. Internet platforms such as Craigslist and Facebook Marketplace provide easily accessible and largely unregulated grey markets for the sale and resale of products. Unlicensed resellers utilize a wide range of websites to make sales and third-party delivery services to make deliveries—increasing

---

[2] Agents in Wyoming (22,000 miles), Missouri (13,000 miles), Nebraska (9,600 miles), Colorado (6,900 miles), New Mexico (5,900 miles), Kansas (4,000 miles), Oregon (2,600 miles), Wisconsin (2,000 miles), Tennessee (1,300 miles), Michigan (1,200 miles), and California (1,100 miles) all cover average territories of 1,000 or more miles. Gagliardi, *The Need for State Alcohol Regulatory Funding*.

the ease with which underage buyers can purchase alcohol over the internet. *Id.* And bad actors across the globe can utilize all of these avenues to sell counterfeit and potentially tainted product with complete anonymity.

Despite calls for states to increase the resources available to alcohol control agencies, *see, e.g.*, *id.*; Tobiassen, *"Fake Alcohol" Situation*, at 3, 7, 34, there has been little action from the states to increase funding or personnel within these departments. Thus, effective alcohol enforcement at the state level is dependent on agents being able to efficiently administer their responsibilities—and that often depends on states' in-state or durational residency requirements.

SUMMARY OF ARGUMENT

States possess nearly unbounded authority to regulate the flow of alcohol within their borders. Exercising this authority, they have concluded that they can best maintain orderly alcohol markets and promote the health and safety of their citizens by requiring alcohol distributors and retailers to reside within the state—often for one or two years—in order to do business there. These residency and durational residency requirements are no "mere economic protectionism" seeking to promote local industry over out-of-state alcohol purveyors. *Bacchus*, 468 U.S. at 276. Rather, states have determined over their almost century-long experience regulating alcohol markets that requiring distributors and retailers to maintain an in-state presence is critical to state enforcement of alcohol laws "enacted to combat the . . . evils of an unrestricted traffic in liquor." *Id.* Indeed, the states' broad right to regulate in this area means nothing if they cannot enforce those laws successfully.

Residency requirements (including durational residency requirements) facilitate state enforcement agencies' monitoring alcohol purveyors within the state and holding them accountable if they violate state law. *First*, in-state residency requirements ensure that alcohol agents can physically inspect the premises of licensees as well as their products. Such physical oversight is critical to detecting legal violations or safety issues with the alcohol being sold in the state. *Second*, in-state residency requirements guarantee that state alcohol agencies can enforce penalties against violators. Alcohol purveyors that reside within the state will be subject to the state court's personal jurisdiction and will have assets within the state that can be attached in an *in rem* proceeding to satisfy any judgment. *Third*, residency requirements subject alcohol distributors and retailers to both the negative externalities that aggressive alcohol sales create and social pressure from the community to promote moderation. These forces cause alcohol purveyors to self-police, lessening the oversight burden on already-overloaded state agents.

Residency requirements also substantially contribute to the effectiveness of the three-tier system that has been adopted by almost every state. *First*, requiring wholesalers and retailers to maintain an in-state presence facilitates close business ties and regular in-person interactions at the retailer's establishment. This tight relationship allows both parties to detect and report violations of state law and assist their business partners in complying with the state's requirements. Physically visiting the retailer's premises also makes it more likely that one of the parties will detect any unlicensed, illegal, or counterfeit alcohol before it enters the stream of commerce. *Second*, requiring distributors to reside within a state and sell exclusively to retailers in

the state limits the number of wholesalers the market can sustain. The relatively minor number of wholesalers through which all alcohol in the state passes provides an efficient access point to inspect products and transaction records, collect excise taxes, and track any dangerous product if a flaw or contaminant is discovered. Absent residency requirements, the three-tier system would become diffuse and unwieldy, undermining much of what has made it so appealing to state regulators.

In sum, states' purpose in enacting residency requirements for alcohol purveyors was to ensure that each state could successfully enforce its laws, which are designed to vindicate the "clear concern[s] of the Twenty-first Amendment," *Bacchus*, 468 U.S. at 276, including keeping alcohol out of the hands of children, preventing the overserving of liquor to inebriated patrons, protecting consumers from tainted or counterfeit product, and curbing the availability of alcohol to promote moderation. These laws are thus protected under the Twenty-first Amendment or, at the least, advance "legitimate local purpose[s] that cannot be adequately served by reasonable nondiscriminatory alternatives." *Granholm*, 544 U.S. at 489. Therefore, the judgment of the Sixth Circuit should be reversed.

ARGUMENT

I. In-state residency requirements are critical to states' efforts to enforce alcohol regulations for the health and safety of their citizenry.

State laws requiring alcohol retailers and wholesalers to maintain an in-state presence are an effective means by which overburdened state agents can protect the health and safety of the state's population. In-state presence requirements facilitate enforcement in three ways: they (1) enable state alcohol enforcement officers

to physically inspect alcohol wholesalers and retailers operating in the state; (2) guarantee that agents can enforce the law against such wholesalers and retailers; and (3) reduce noncompliance by fostering ties between licensees and the community in which they operate.

A. Residency requirements ensure that agents can physically inspect licensees' premises and products.

The importance of in-state residency requirements for effective inspection of licensees' premises and products is a matter of basic geography. Quite simply, state alcohol enforcement agents cannot travel around the country inspecting wholesalers or retailers—certainly not on their budgets.

The laws of nearly every state authorize state alcohol enforcement agents to inspect the premises and books of alcohol manufacturers, wholesalers, and retailers located within the state. *See, e.g.*, Ala. Code §§ 28-5-10, 28-7A-6; Ark. Code Ann. § 3-2-205; Ga. Code Ann. § 3-2-32; Ind. Code § 7.1-2-3-12; La. Stat. Ann. § 26:375; Md. Code Ann., Alco. Bev. § 6-202; Mo. Rev. Stat. §§ 311.490–311.540; N.C. Gen. Stat. Ann. § 18B-502; Tenn. Code Ann. §§ 57-3-204(b)(4), -409; Texas Alco. Bev. Code Ann. § 101.04; Va. Code Ann. § 4.1-204. Agents regularly visit the premises of licensed entities to ensure that they are complying with the state's applicable laws. Virginia enforcement officers, for example, spent 70% of their time in 2017 on "regulatory compliance," consisting of "conducting background investigations, license suitability and inspections of licensed establishments." Va. Dep't of Alcoholic Beverage Control, *Annual Report* 8 (2017), https://perma.cc/B2UC-C8GX. Agents there conducted 12,446 inspections of licensed establishments, 752 additional observations of licensed establishments, and

3,829 compliance checks regarding underage buyers last year. *Id.*

These inspections are the lynchpin of enforcing state alcohol regulations: research suggests that "the effectiveness of alcohol control policies depends heavily on the 'intensity of implementation and enforcement and on the degree to which the intended targets are aware of both the policy and its enforcement.'" Nat'l Highway Traffic Safety Admin., *The Role of Alcohol Beverage Control Agencies*, at 4 (citation omitted). They also uncover major wrongdoing that jeopardizes the health and safety of state residents. Enforcement agents in New Jersey, for example, conducted a yearlong undercover investigation in 2013 known as Operation Swill, in which they determined that twenty-nine bars and restaurants in the state were selling "scotch" that actually consisted of rubbing alcohol and caramel coloring and other brands of spirits that had been diluted with contaminated water. *Scores of TGI Fridays Among New Jersey Bars Accused of Substituting Cheap Alcohol for Premium Brands in Statewide Crackdown*, Daily Mail (May 24, 2013), https://dailym.ai/2Q5Jela.

And these inspections would be impossible if wholesalers and retailers were authorized to do business in foreign states. Even if they were allowed to do so, state agents who are already overburdened trying to oversee hundreds of licensees within the state do not have the time to travel to foreign states to do inspections. Nor do already cash-strapped state alcohol control agencies have the financial resources to fund such interstate travel by their officers. As one state regulator testified before Congress:

> Michigan uses its limited resources . . . to verify that Michigan's regulatory system is being

> followed, that only approved alcoholic beverages are being sold, that alcoholic beverages are not being sold to underage persons and that taxes are being paid. Michigan simply does not have the ability or financial resources to effectively regulate hundreds of thousands of out-of-state retailers to ensure they are not selling to minors and to ensure that they are paying taxes and only selling products approved by the Commission.

Legal Issues Concerning State Alcohol Regulation: Hearing Before the Subcomm. on Courts & Competition Policy of the H. Comm. on the Judiciary, 111th Cong. 43 (2010) (statement of Nida Samona, Chairperson, Mich. Liquor Control Commission).

State agents would also find themselves unable to keep up with the sheer number of establishments for which they would be responsible. If every existing wholesaler or retailer could operate in all fifty states, each agent would be responsible for as many as fifty times the number of licensees they currently oversee. As an example of this system's impracticality, consider Wyoming, which currently employs three state agents to ensure compliance with state alcohol law. Gagliardi, *The Need for State Alcohol Regulatory Funding*. There are approximately 570,000 licensed alcohol producers, distributors, and retailers in the United States. *Id.* It would be impossible for Wyoming's three agents to monitor every distributor and retailer that might occasionally distribute or sell alcohol in Wyoming, even if that number was only 1% of all distributors and retailers in the country.

B. In-state residency requirements facilitate enforcement actions for violations of state alcohol laws.

Requiring alcohol distributors and wholesalers to have an in-state presence ensures that enforcement agencies have jurisdiction to hold these entities responsible for violations of the state's alcohol laws—particularly with *in rem* actions. Adjudication of such violations is necessary to deter future wrongdoing by licensees and preserve the functioning of the state's alcohol regulatory system. *See* Nat'l Highway Traffic Safety Admin., *The Role of Alcohol Beverage Control Agencies*, at 7. The Sixth Circuit's decision erodes that enforcement power.

For state alcohol laws to effectively protect against health and safety risks, state regulators need to be able to impose penalties on violators—and in-state presence ensures that the state can collect on fines and other monetary penalties imposed by the courts. When enforcing alcohol laws, state agents regularly seek to impose fines, payment of outstanding taxes, and disgorgement of illicit profits made within the state. *See, e.g.*, Am. Complaint ¶¶ 37–44, *Hood v. Wine Express, Inc.*, No. 17-cv-2064 (Miss. Chancery Ct. Feb. 1, 2018), Dkt. No. 14; *see also* Tobiassen, *"Fake Alcohol" Situation*, at 7. These financial penalties deter future violations of alcohol control laws by ensuring that "the costs of violating the law significantly outweigh the benefits obtained." Nat'l Highway Traffic Safety Admin., *The Role of Alcohol Beverage Control Agencies*, at 7.

Critically, if distributors and wholesalers are required to be present within the state, these entities necessarily have assets that can be attached by enforcement agents in an *in rem* proceeding. *See Shaffer*

v. Heitner, 433 U.S. 186, 207 (1977). That is a serious threat. Some violators may tolerate fines as a cost of doing business, others may attempt to evade fines by just deciding not to pay them, forcing the state to endure endless attempts to collect. The power to attach physical assets adds critical muscle to overburdened state enforcement agencies. But without in-state residency, *in rem* actions are not possible. *Shaffer*, 433 U.S. at 207. The upshot: Absent a presence requirement, the state's alcohol enforcement regime would be largely toothless.

Furthermore, requiring that licensees have a presence in the state obviates questions regarding personal jurisdiction and long-arm statutes. Consider a recent case where a state sought to enforce its alcohol laws against an out-of-state entity—the matter was dismissed for lack of jurisdiction. In *Hood v. Wine Express, Inc.*, Mississippi enforcement agents brought an enforcement action against several out-of-state alcohol retailers that had shipped alcohol into the state without the required licenses, including shipments to dry counties and to underage customers. Am. Complaint ¶¶ 12–28, 34, *Hood v. Wine Express, Inc.*, No. 17-cv-2064 (Miss. Chancery Ct. Feb. 1, 2018), Dkt. No. 14. The chancery court dismissed the action, concluding that it lacked personal jurisdiction over any of the out-of-state retailers. Corrected Final Judgment, *Hood*, No. 17-cv-2064 (Sept. 4, 2018), Dkt. No. 59.

This issue has not arisen frequently because most alcohol distributors and retailers follow in-state presence requirements, thus ensuring states have jurisdiction to enforce their laws. *See* Tobiassen, *"Fake Alcohol" Situation*, at 3, 6–7. If, however, states could no longer require licensees to be present in the state, *all* alcohol purveyors in the state could potentially place themselves

beyond the reach of enforcement agencies, thus allowing them to flout state liquor laws. At the very least, requiring entities to have a physical in-state presence allows state attorneys to establish the court's personal jurisdiction and authority under long-arm statutes without having to invest time and money in extensively litigating the issue. *See, e.g., Burnham v. Superior Court of Cal.*, 495 U.S. 604, 610 (1990) ("Among the most firmly established principles of personal jurisdiction in American tradition is that the courts of a State have jurisdiction over nonresidents who are physically present in the State.").

C. Residency requirements foster self-regulation through ties to the community and local pressure.

In-state presence requirements also promote orderly markets by ensuring that wholesalers and retailers are subject to any negative externalities related to alcohol consumption occurring in the communities they serve. Congress has recognized that alcohol "is a unique product" that "should be regulated differently than other products by the States and Federal Government." Sober Truth on Preventing Underage Drinking Act, Pub. L. No. 109-422, § 2, 120 Stat. 2890, 2891 (2006). Unlike other products, the sale of alcohol subjects the surrounding community to "negative externalities," including "drunk driving, domestic abuse, [and] underage drinking." *S. Wine & Spirits of Am. v. Div. of Alcohol & Tobacco Control*, 731 F.3d 799, 811 (8th Cir. 2013).

One pernicious feature of the "tied-house" system that preceded Prohibition was that alcohol purveyors did not live in the communities in which they sold their products. "The manufacturer knew nothing and cared nothing about the community. All he wanted was

increased sales. He saw none of the abuses, and as a non-resident he was beyond local social influence." Raymond B. Fosdick & Albert L. Scott, *Toward Liquor Control* 43 (1933). And under the old system, that manufacturer could sell directly to the consumer or retailer yet stay far from the eye of the local community.

In modern alcohol regulatory systems, states require that alcohol wholesalers and retailers reside in the state so that they will experience any negative externalities they create by selling alcohol in the community. For example, alcohol retailers live near those to whom they sell alcohol and drive on the same streets as their establishment's patrons. They pay taxes and vote in the same location as their customers, aligning their interests in maintaining the public health and safety of the community. In theory, wholesalers and retailers will balance these concerns against their profit motive when deciding what to sell, to whom, and in what quantity. In addition, in-state presence requirements subject retailers to local social pressure if they engage in undesirable behavior such as overserving intoxicated customers, failing to adequately prevent underage drinking, or otherwise failing to run a safe and orderly establishment. *See* Tobiassen, *"Fake Alcohol" Situation*, at 7; *see also Granholm*, 544 U.S. at 523–24 (Thomas, J., dissenting) ("Presence ensures accountability.").

Consider the example of Four Loko, a notorious line of caffeinated alcoholic beverages that became popular on college campuses between 2005 and 2010. Colleges and universities began to identify a rash of student hospitalizations due to injuries and blackouts resulting from the misuse of Four Loko. As a result, in 2010, these educational institutions urged students to avoid Four Loko and, in some cases, banned the drinks from

campus. In response, a host of national and local retailers voluntarily stopped selling the beverages. *See* Matthew Reid, *Medford Liquor Stores Pull Four Loko from Shelves before Ban*, Wicked Local (Nov. 24, 2010), https://bit.ly/2TlE9Uy; *Wegmans Pulls Four Loko off Store Shelves*, Rochester First (Nov. 10, 2010), https://bit.ly/2KiePdS; Jack Broom, *NW Grocery Chain Pulls Four Loko Drinks off Shelves*, Seattle Times (Oct. 26, 2010), https://perma.cc/N5PZ-LTS8. When distributors and retailers live in the community they service, they see first-hand the damage that they cause by selling dangerous products like Four Loko. Retailers had to confront the reality that youth in their own neighborhoods were going to the hospital because of the dangerous products they sold. These same retailers also faced mounting pressure from universities and other groups of concerned adults in the community. Together, these forces caused retailers to self-regulate before states or the federal government could pass formal regulations.

Due to the burdens placed on state alcohol enforcement agents, in-state presence requirements are critical to maintaining an effective and orderly system of alcohol regulation.

II. Eliminating in-state presence requirements would undermine the efficacy of the entire three-tier system of alcohol control.

Adopting the Sixth Circuit majority's position here would undermine alcohol enforcement in another way: it would erode the three-tier system altogether. The three-tier system has effectively regulated alcohol across the fifty states since the end of Prohibition. It has ensured consumer safety, resulted in the efficient collection of tax revenue for the state and federal government, created

diverse alcohol markets, and promoted moderate consumption among the population. In-state presence requirements—particularly for alcohol wholesalers—are critical to maintaining a functional three-tier system. Eliminating these requirements would threaten the alcohol regulatory systems that have provided safe and stable alcohol markets in the United States for more than a generation.

A. The three-tier system provides an effective method for states to regulate alcohol within their borders.

The three-tier system of alcohol regulation developed by the states has proven tremendously effective in securing orderly markets and promoting the health and safety of the community. Two features of the system particularly contribute to its success in facilitating health and safety enforcement: (1) it requires that alcohol move through multiple independent entities, allowing each level to provide a check on the other tiers, and (2) because the number of wholesalers remains relatively small, it allows states to use the wholesale level as a checkpoint for enforcement measures.

First, the three-tier system fosters compliance with state alcohol laws by creating three independent levels of distribution that regularly interact with each other in the course of business. And because each entity is subject to regulation and inspection by state agents, these tiers help police the compliance of the other levels. As both *amici* and independent scholars have recognized, "private actors at each of the three tiers have significant incentives to assure that their business partners in the other tiers adhere to regulations," and "the day-to-day contact with [their business partners] . . . enable[s] them to identify and address any compliance problems." Roni

Elias, *Three Cheers for Three Tiers: Why the Three-Tier System Maintains Its Legal Validity and Social Benefits After Granholm*, 14 DePaul Bus. & Com. L.J. 209, 219–20 (2015). For example, wholesalers help ensure that retailers are not selling counterfeit alcohol or alcohol purchased from a non-licensed wholesaler: "Because licensed distributors visit licensed retailers regularly, they notice a product that they did not supply." Pamela Erickson, *Safe and Sound: How the Three-Tier Alcohol Regulatory System Promotes Safe Products and High Revenue Collections* (Apr. 2015), https://perma.cc/9M5M-A6EP. Conversely, "a distributor is unlikely to jeopardize its license by offering a fake product to a licensed retailer." *Id.* And because both entities are obligated to report any violations they see committed by another licensed entity, violations are brought to enforcement agents without expending significant state resources.

This mechanism of self-regulation is especially important given that state agencies do not always have the resources to provide frequent inspections. Without the separate tiers checking one another, and with the knowledge that state regulators might not make rounds for months (or even a year), alcohol purveyors have much more leeway to violate state law with impunity.

Second, because the number of licensed distributors/wholesalers in each state remains relatively small, they provide an ideal access point for regulators to control the flow of alcoholic beverages, collect excise taxes, monitor compliance with regulations, and quarantine any tainted or otherwise-dangerous alcohol to prevent it from becoming available to consumers. "The structure of the usual three-tier system is commonly described as an hourglass, with wholesalers at the constriction point." *Family Winemakers of Cal. v.*

Jenkins, 592 F.3d 1, 5 (1st Cir. 2010). Wholesalers purchase alcohol from various suppliers around the world, transport and possess the alcohol in their home state, then sell the alcohol to numerous local retailers. Because wholesalers trade in large volumes of alcohol, the number that can exist in each state alcohol market is much smaller than the number of producers or retailers present in that state. As a result, enforcement agents can most effectively monitor the flow of alcohol through the relatively few wholesalers in the state and collect taxes on each transaction by reviewing these wholesalers' records. *See* Erickson, *Safe and Sound*.

In addition, the small number of distributors allows producers and state regulators to quickly identify, track, and quarantine tainted or counterfeit products at these locations more efficiently than attempting to locate products at every retailer in a given state. In 2008, Boston Beer Company Inc. recalled nearly one million cases of Samuel Adams beer after it discovered a defect in the bottle that could cause small pieces of glass to break off and fall into the beer. Bibeka Shrestha, *Boston Beer Gets $20.5M to Settle Recall Claims*, Law 360 (May 10, 2011), https://perma.cc/3FN2-8WT4. The company publicly stated that no injuries were reported to them. *Id.* When such recalls—voluntary or involuntary—occur, manufacturers rely on their suppliers to handle the local logistics of finding, acquiring, and quarantining potentially dangerous products. Because of their centralized nature, distributors are able to quickly determine where dangerous products have been sent and prevent them from being sold to consumers. By contrast, in numerous other countries not employing the three-tiered system, deaths and injuries from tainted and counterfeit products are common. *See, e.g.*, Benjamin Fearnow, *Blackouts, Deaths at Mexican Resorts Prompt US State*

Department Investigation, Int'l Bus. Times (Dec. 13, 2017), https://perma.cc/YT8G-V5L3; Neil MacFarquhar, *Where the Booze Can Kill, and Putin Is Deemed a 'Good Czar'*, N.Y. Times (Feb. 18, 2017), https://nyti.ms/2lWCxDe; Sarah Kaplan, *Nearly 100 Die from Drinking Tainted Alcohol in Mumbai 'Hooch Tragedy,'* Wash. Post (June 22, 2015), https://wapo.st/2A4yTf7. The security risks are real, and the three-tier system allows regulators to act quickly, without having to go to hundreds of retailers to enforce state laws; instead, they can cut off problems at the wholesaler.

B. Eliminating states' physical presence requirements would undermine the effectiveness of the three-tier system.

If states could no longer require alcohol distributors and retailers to be physically present in the state in order to do business there, many of the three-tier system's benefits would be lost.

First, the check that each tier of the system of distribution provides on the others would be reduced, if not eliminated entirely. If wholesalers and retailers could be located in separate states, wholesalers would no longer regularly visit retailers' premises, compromising their ability to detect the presence of alcohol that had come from unknown, perhaps unlicensed, sources. In a national marketplace, each retailer might do business with hundreds of wholesalers and each wholesaler with thousands of retailers. In this system, neither party would be familiar enough with the business operations of the other to detect the other's violations of state law. Nor would they necessarily be familiar with the other's state laws. Such a diffuse system would make it easier for bad actors to sell counterfeit or tainted alcohol to retailers,

secure in the knowledge that it would be unlikely to be detected by state agents or traced back to them among all of the distributors supplying a particular retailer.

Second, eliminating in-state presence requirements would massively expand the number of wholesalers operating in each state. The number of retailers in the state would no longer limit the number of distributors able to operate because each distributor could sell in large quantities to retailers in other states. As a result, the distributor level of the three-tier system would no longer act as the narrowing point in the "hourglass," and it would no longer provide an efficient point in the alcohol distribution system to inspect products or collect taxes.

This effect is already apparent due to interstate shipping of alcohol. When alcohol is shipped from producers to consumers rather than going through the clearinghouse of the wholesaler, it becomes more difficult for enforcement agents to track each sale to ensure excise tax is paid. In 2008, nearly 9.6% of wine sales were shipped without excise tax ever collected. Am. Assoc. of Wine Economists, *Direct Ship Blowout: How the Supreme Court's Granholm Decision Has Led to a Flood of Non-Taxed Wine Shipments* 21 (Working Paper No. 61, June 2010), http://njlsa.com/AAWE.pdf. If alcohol comes into a state through hundreds or thousands of different wholesalers from around the country (or even the world), it will be impossible for state agents to review the records of each distributor to ensure that excise tax on each transaction has been collected. Nor could agents confirm that each transaction has been conducted in accordance with state law.

This Court has held that the three-tier system is "unquestionably legitimate." *Granholm*, 544 U.S. at 489.

But eliminating in-state and attendant durational residency requirements would strike at its heart. If this Court were to adopt the Sixth Circuit's position, the three-tier system would lose much of the effectiveness that has caused it to persist for decades.

III. Durational residency requirements are even more potent in effectuating the goals of the three-tier system.

As described above, state laws requiring that alcohol distributors and retailers reside within the state ensure that states can maintain orderly alcohol markets and protect the health and safety of their residents. Durational residency requirements, like the one adopted by Tennessee and at least 20 other states, are a further extension of those regulations, and they provide several additional benefits that make such regulation even more effective. That is, in-state requirements are not protectionist policies; they are policies meant to protect the health and welfare of a state's inhabitants. And durational residency requirements just further those protections.

For example, consider the value in-state requirements provide by allowing state enforcement through *in rem* actions. By requiring persons interested in obtaining alcohol licenses to live within the state for a certain period of time, states increase the likelihood that the person or corporation will acquire assets (and significant assets) within the state. Such assets may then be attached as part of an *in rem* enforcement action against the person or entity if it violates state law.

Consider too the value of community ties and local pressure for self-regulation within the industry facilitated by in-state residency. Laws requiring that wholesalers and retailers live in the state for a number of

years make it even more likely that licensees have established strong ties to the community, which makes it more probable that these entities will be cognizant of the negative externalities alcohol sales can cause in the community. Entities will likewise be susceptible to social pressure from community members. Retailers subject to durational-residency requirements are thus more likely to promote moderation above sales, thereby fulfilling the primary goal of the three-tier system.

For these reasons, durational residency requirements provide the strongest method of fulfilling states' purposes of maintaining orderly alcohol markets while promoting the safety and health of citizens.

CONCLUSION

The judgment of the Sixth Circuit should be reversed.

Respectfully submitted,

RACHEL BLOOMEKATZ
Counsel of Record
ALEXANDRIA TWINEM
GUPTA WESSLER PLLC
1900 L Street, NW, Suite 312
Washington, DC 20036
(202) 888-1741
rachel@guptawessler.com

J. NEAL INSLEY
LARRY BUCKNER
NATIONAL ALCOHOL BEVERAGE
CONTROL ASSOCIATION
4401 Ford Avenue, Suite 700
Alexandria, VA 22302-1473
(703) 578-4200
neal.insley@nabca.org

November 20, 2018 *Counsel for Amici Curiae*